

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

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The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N. W.
Washington, D.C. 20554

Re: Broadband PCS C Block Auction

Dear Mr. Chairman:

Thank you for allowing us to meet yesterday with you and members of the Commission staff to discuss the extent to which the U. S. Supreme Court's recent decision in Adarand Constructors, Inc. v. Peña, Secretary of Transportation, Case No. 93-1841, June 12, 1995, may impact the Commission's broadband PCS auction rules.

I. The Adarand decision does not require the Commission to change its auction rules

As we explained yesterday, it is the position of NABOB that Adarand does not require the Commission to make any changes in the designated entity rules which will be applied in the August 2 auction. The Adarand decision held only that reviewing courts must use a "strict scrutiny standard" when analyzing racial classifications. The Court did not rule whether the statutory scheme before it, or any other statutory scheme, fails to meet the strict scrutiny standard. The Court certainly made no ruling as to the statutory scheme relied upon by the Commission in adopting its PCS auction rules.

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On June 14, 1995, the President of the United States issued a statement in which he stated:

It is regrettable that already, with the ink barely dry, many are using the Court's opinion as a reason to abandon [the affirmative action] fight. Exaggerated claims about the end of affirmative action -- whether in celebration or dismay -- do not serve the interest all of us have in a responsible national conversation about how to move forward together and create equal opportunity.

The President's statement makes clear that the Court's decision does not require a retreat on existing governmental affirmative action policies. Therefore, we urge the Commission to proceed with the acceptance of Form 175 applications for the C block auction at the earliest possible date, and to begin the auction as scheduled on August 2. Our reasons for proposing this course of conduct are the following:

1. The Commission has a statutory obligation under Section 309(j) of the Communications Act to promote ownership opportunities for minorities when auctioning the nation's radio frequency spectrum. The Commission may not abdicate that statutory responsibility on the "possibility" that the statute may be challenged. It is the role of the Commission to implement Congress's statutory directives until the courts rule specifically that such statutory directives are unlawful. In the Adarand decision, the court did not rule that Section 309(j), or any other statute passed by Congress, is unconstitutional. Absent such a specific ruling, the Commission's statutory obligation to proceed with the implementation of Section 309(j) remains as directed under the Omnibus Budget Reconciliatory Act. Indeed, Chief Justice Rehnquist has recently observed that all Acts of Congress are "presumptively constitutional" and "should remain in effect pending a final decision on the merits." Turner Broadcasting System, Inc. v. FCC, 113 S.Ct. 1806, 1807 (1993) (Rehnquist, C.J. in chambers) (quoting Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J. in chambers)).

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2. In the Adarand decision, a bare five justice majority of the Court held that "strict scrutiny" is the standard of review which should be employed when analyzing legislative enactments which are designed to remedy the effects of racial discrimination. However, the Court did not apply that standard to the facts before it, or to the facts of any other case. Most importantly, the Court did not address the issue of the type of record Congress or the Commission must create to adopt a race-based remedy for past discrimination, despite the Court's extensive discussion of prior precedent in this area.

3. The Adarand decision provides no basis for determining whether any legislative or agency action fails to meet the strict scrutiny standard. It certainly provides no basis for determining whether (a) Section 309(j) of the Communications Act fails to meet the strict scrutiny standard, or (b) whether the Commission's rules implementing Section 309(j) fail to meet the strict scrutiny standard.

4. Seven justices of the Court agreed in the Adarand decision that racial discrimination continues to be a reality of American life today and that race-based policies to address the effects of past racial discrimination are constitutionally permissible. "[We] wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citation omitted.) The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." (emphasis added.)

5. The Commission has a well documented record to support its broadband PCS auction rules spectrum. The Commission spent over a year developing the record and revising its rules to carefully implement the specific statutory requirements of Section 309(j).

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6. The record established by the Commission is more than adequate to demonstrate that: (a) there is a compelling government interest in creating economic opportunity to remedy the past and present effects of racial discrimination, (b) there is a compelling First Amendment governmental interest in promoting minority ownership and control of the frequencies which will be used to transmit communication, information and entertainment services to the American people well into the 21st century, (c) the lack of present ownership by minorities in this industry is directly attributable to the effects of past and present racial discrimination, and (d) the auction rules are revisited for each service the Commission auctions, such that the race-based policies will not last longer than the discriminatory effects they are designed to eliminate.

7. The Commission's record supporting the compelling need to remedy the effects of past racial discrimination dates back at least to 1968 when the Commission adopted its first equal employment opportunity rules. This places the Commission in a much different evidentiary position than the City of Richmond in Richmond v. J.A. Croson, 488 U.S. 469.

8. The record relied upon by Congress to support Section 309(j) dates back to the earliest civil rights statutes and well precedes the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448.

9. If the Commission abandons its statutory obligation to provide minority ownership incentives in the C block broadband PCS auction, it will result in a substantial change in the Commission's rules upon which minority bidders have relied in creating their business plans and raising their financing. Sudden reversal of the rules may preclude some of those entities from being able to bid at all. Such a last minute abandonment of the Commission's minority ownership incentives, only a few days before the application filing deadline, raises substantial legal questions of notice and opportunity to comment under the Administrative Procedure Act, as well as general considerations of equity.

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10. Abandonment of the minority ownership incentives may result in the C block broadband PCS auction mirroring the result of the A and B block PCS auction and the national narrowband PCS auction -- no successful minority bidders.

II. The Commission can take steps to avoid the potential problems raised by Adarand

In order to avoid an auction which results in little or no successful minority bidders, the Commission should adopt the following course of conduct:

1. Proceed with the auction as currently planned with the rules currently in place.

2. The Commission has no way of knowing at this time whether an appeal of its auction rules will be filed prior to the August 2 auction. Further, even if an appeal is filed, the Commission does know at this time whether it will be enjoined. If the Commission is enjoined from proceeding with the auction prior to August 2, the Commission should then decide whether to revise its auction rules in light of any specific ruling by the applicable court. To abandon its minority ownership incentives prior to receiving such a ruling from a court would constitute an abrogation of its responsibility to carry out its mandate from Congress.

3. If the Commission is not enjoined, it should proceed with the August 2 auction under its current rules without revision.

4. Any minority bidder concerned that any license it wins in the auction will be subject to potential post-auction legal challenges is already permitted under the Commission's rules to forego the minority ownership incentives. Such an applicant need only choose not to fill in the portion of the application which asks if the applicant plans to take advantage of those rules. Those prospective minority bidders who believe that they need the minority incentive provisions should not be precluded from

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receiving those incentives because some potential minority applicants feel they do not need those incentives.

5. Moreover, to provide even more flexibility for bidders to avoid judicial challenge, the Commission should amend its bidding procedures to allow all applicants to wait until after the auction to choose whether to utilize the bidding preferences. Then, in the event bidding is not as intense as currently contemplated, minority bidders may find that they do not need the bidding credits to bid successfully. This approach could result in the best of both worlds. Minority bidders could elect at the conclusion of the auction whether to spend more money to avoid the uncertainty caused by litigation, and the PCS auction could be completed with little chance of post-auction litigation.

III. Conclusion

The Adarand decision did not rule on the constitutionality of Section 309(j) or on the constitutionality of the rules the Commission adopted to implement Section 309(j). It would be a violation of its statutory obligation for the Commission to disregard its statutory mandate without having been directed to do so by a reviewing court.

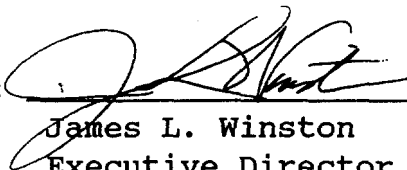
A decision by the Commission to eliminate its minority ownership incentives at this stage would constitute exactly the type of abandonment of affirmative action the President spoke against. NABOB urges the Commission to meet its statutory obligation to implement Section 309(j) and to proceed with the August 2 auction without making any *sua sponte* last-minute changes to its rules. Such action could impose irreparable injury to potential bidders who have prepared to bid in the auction based upon the Commission's announced rules.

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Sincerely,

The National Association of
Black Owned Broadcasters

By:



James L. Winston
Executive Director and
General Counsel

By:



Lois E. Wright
Vice President and
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Inner City Broadcasting
Corporation

cc: Commissioner James Quello
Commissioner Andrew Barrett
Commissioner Rachelle Chong
Commissioner Susan Ness